

IS REPRESENTATION IN AN ARBITRATION CONSIDERED THE UNAUTHORIZED PRACTICE OF LAW IN MISSISSIPPI?

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I. INTRODUCTION

Arbitration is a process that private parties to a contract can agree will be the method by which any dispute arising under the contract can be resolved through a binding decision by a neutral third party – as opposed to going through the time and expense litigating the dispute in the courts.² As stated by the Mississippi Supreme Court, “arbitration is a substitute for . . . litigation. The object is to avoid what some feel to be the formalities, the delay, the expense and vexation of ordinary litigation.”³ There are two ways in which arbitration most commonly arises. The first is where the parties to the contract or agreement take their dispute directly into private arbitration before an arbitrator or panel of arbitrators. The second is where, during litigation, one party asserts through a motion to compel arbitration that there was an agreement to arbitrate the current dispute contained in an agreement, and the court subsequently grants the motion and either dismisses or stays the case pending an award from the arbitrator. The Federal Arbitration Act (“FAA”), which applies to arbitration agreements in maritime transactions and in contracts “evidencing a transaction involving commerce,” requires courts to enforce private agreements to arbitrate according to the agreement’s terms.⁴ The FAA demonstrates a federal policy favoring private arbitration agreements⁵ and provides for some court involvement such as the appointment of an arbitrator,⁶ when necessary, and the enforcement of arbitration awards.⁷

While courts have clear procedures for involvement of out-of-state attorneys,⁸ arbitration can present a more difficult problem for the attorney not licensed in the forum state. Many arbitration agreements involve citizens of different states, and some provide for a specific geographic venue, meaning that one or more of the participants may be located in another state. Some parties prefer to have their own attorney participate, and

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² See *Hutchings v. U.S. Indus., Inc.*, 428 F.2d 303, 312 (5th Cir. 1970) (“The arbitration process is a private one essentially tailored to the needs of the contracting parties, who have agreed upon this method for the final adjustment of disputes under their contract.”).

³ *Johnson Land Co. v. C.E. Frazier Constr. Co., Inc.*, 925 So. 2d 80, 86 (Miss. 2006) (citation omitted); see also *Preston v. Ferrer*, 128 S. Ct. 978, 986 (2008) (“A prime objective of an agreement to arbitrate is to achieve streamlined proceedings and expeditious results.”) (internal quotations omitted).

⁴ See 9 U.S.C. §§ 2, 4 (2006); see also *Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 474-75 (1989).

⁵ See *Terrebonne v. K-Sea Transp. Corp.*, 477 F.3d 271, 285 (5th Cir. 2007) (citation omitted).

⁶ 9 U.S.C. § 5 (2006).

⁷ *Id.* § 9.

⁸ See, e.g., Miss. R. App. P. 46(b).

since the arbitration may have no real contact with the forum state and since there are no juries or local procedural issues that give rise to the need for local counsel, the arbitration participants prefer to have their own attorney involved even if that person is not licensed in the forum state.⁹ Thus, many practitioners believe that representing a party in a private arbitration proceeding in a state other than where he or she is licensed should not be considered the unauthorized practice of law. This is correct in some states, incorrect in some states, and remains unanswered in others. The answer is unclear in Mississippi. This article will address Mississippi law on the unauthorized practice of law and how it applies to arbitration,¹⁰ what other states are doing to address this issue, and what options are available to an out-of-state attorney who desires to represent a client in an arbitral proceeding to be held in Mississippi.

II. MISSISSIPPI LAW ON WHETHER THE REPRESENTATION OF CLIENTS IN AN ARBITRATION PROCEEDING IS THE UNAUTHORIZED PRACTICE OF LAW

Mississippi's statute on the unauthorized practice of law does not mention arbitration. MISS. CODE ANN. § 73-3-55 provides that:

It shall be unlawful for any person to engage in the practice of law in this state who has not been licensed according to law. Any person violating the provisions of this section shall be deemed guilty of a misdemeanor, and, upon conviction, shall be punished in accordance with the provisions of section 97-23-43. Any person who shall for fee or reward or promise, directly or indirectly, write or dictate any paper or instrument of writing, to be filed in any cause or proceeding pending, or to be instituted in any court in this state, or give any counsel or advice therein, or who shall write or dictate any bill of sale, deed of conveyance, deed of trust, mortgage, contract, or last will and testament, or shall make or certify to any abstract of title or real estate other than his own or in which he may own an interest, shall be held to be engaged in the practice of law.¹¹

However, the Mississippi Supreme Court has stated that the activities listed in Section 73-3-55 as constituting the practice of law “are not all-exclusive nor all-inclusive” because this list “does not encroach on the constitutional power of the judiciary to determine that other acts” also fall under the definition of the practice of law.¹² Although

⁹ See A.B.A. COMM. ON MULTIJURISDICTIONAL PRACTICE, REPORT 201B (2002), <http://www.abanet.org/cpr/mjp/201b.pdf> (last visited Oct. 21, 2009).

¹⁰ While this article addresses arbitration, mediation is a problem area as well because it too could include out-of-state attorneys not licensed in the forum state. The typical situation would be the appearance at a mediation by an in-house attorney or by a party's regular counsel from outside the forum state.

¹¹ MISS. CODE ANN. § 73-3-55 (2008).

¹² *Darby v. Miss. State Bd. of Bar Admissions*, 185 So. 2d 684, 687-88 (Miss. 1966) (applying predecessor to MISS. CODE ANN. § 73-3-55). The Mississippi Supreme Court stated that statutes addressing this issue “are not a complete enumeration. The courts have inherent authority, independent of statute, to decide what acts constitute the practice of law.” *Id.* at 688. The court in *Darby* also stated that the practice of law does not necessarily involve receiving a fee. Such compensation “may be a factor in determining whether specified conduct constitutes the practice of law, but it is not controlling. The character of the service and its relation to the public interest determines its classification.” *Id.* at 687.

Darby involved a non-lawyer engaging in activities that were deemed to be the practice of law, the Mississippi Supreme Court stated that “any exercise of intelligent choice in advising another of his legal rights and duties brings the activity within the practice of the legal profession.”¹³

A Mississippi Supreme Court decision, styled *In re Williamson*, contains dicta stating that an out-of-state attorney will be deemed to have “ma[d]e an appearance in a Mississippi court” if the attorney physically appears at an arbitration or mediation proceeding.¹⁴ In *In re Williamson*, an out-of-state attorney was seeking pro hac vice admission to appear in a medical malpractice action, but the trial court denied the motion because he had participated or appeared in more than five cases within the immediately preceding twelve months, thereby violating what is currently Mississippi Rule of Appellate Procedure 46(b)(8)(ii).¹⁵ Following the denial of the out-of-state attorney’s motion for admission pro hac vice, the trial court found the foreign attorney and his local counsel in contempt of court for violating the court’s order.¹⁶ The court determined that the out-of-state attorney had participated during a deposition of the defendant by taking notes and placing them on the floor in an attempt to allow the local attorney who was conducting the deposition to pick the notes up and use them to depose the defendant.¹⁷

The Mississippi Supreme Court affirmed the trial court’s denial of the out-of-state attorney’s motion for admission pro hac vice and, in doing so, addressed the definition of “appearance” as that term is used in Mississippi Rule of Appellate Procedure 46(b).¹⁸ The Court stated that:

A foreign attorney may further make an appearance in a Mississippi court by physically appearing at a docket call, a trial, a hearing, any proceeding in open court, at a deposition, at an *arbitration or mediation proceeding*, or any other proceeding in which the attorney announces that he or she represents a party to the lawsuit or is introduced to the court as a representative of the party to the lawsuit. These actions require that the foreign attorney be admitted pro hac vice.¹⁹

Based upon the context of this statement, one could argue that the Mississippi Supreme Court was addressing a situation where the arbitration arises out of a court proceeding in Mississippi, as opposed to private arbitration proceedings with no court ordering the

¹³ *Id.* (citation omitted). In *Darby*, the defendant was a chancery court clerk who was alleged to have, *inter alia*, prepared deeds, deeds of trust, notes, bills of sale, and real property title certificates. *See id.* at 685-86.

¹⁴ 838 So. 2d 226, 235 (Miss. 2002). The Court also reaffirmed *Darby*’s statement regarding the practice of law, when it noted that “[t]he ‘practice of law’ has been defined to be as little as advising a person of his legal rights.” *Id.* at 234.

¹⁵ *See id.* at 229-30. Rule 46(b)(2) states that “[a] foreign attorney shall not appear in any cause except as allowed pro hac vice under this Rule 46(b).” Miss. R. App. P. 46(b)(2).

¹⁶ *See In re Williamson*, 838 So. 2d at 232-33.

¹⁷ *Id.*

¹⁸ *See id.* at 235-37. The Court did reverse the criminal contempt judgments against the two attorneys. *See id.* at 238.

¹⁹ *Id.* at 235 (emphasis added).

parties to conduct arbitration. However, later in the opinion, the Court quotes language from a Kansas Supreme Court decision which *suggests* representing a client in a private arbitral proceeding could be considered the practice of law in Mississippi.²⁰ Despite the broad language utilized in the Supreme Court of Kansas opinion, it was also dicta as the decision involved a layperson appearing in court and filing papers in the courts of Kansas.²¹ Based upon the foregoing, an out-of-state attorney wanting to represent a client in a Mississippi arbitration would be wise to give further consideration to this issue.

One approach might be to seek pro hac vice admission to participate in the arbitration. In the case of an arbitration with no related court proceeding, even if an attorney wanted to pursue pro hac vice admission it is unclear how that could be accomplished.²² Would all the provisions of Mississippi Rule of Appellate Procedure 46(b) apply to this type of request?²³ An additional consideration would be, if one were to seek pro hac vice admission from a Mississippi court, to which court would the lawyer apply?²⁴

All this leaves the issue of arbitration as the unauthorized practice of law in Mississippi in some doubt. We will now turn to the national picture, which is not significantly clearer.

²⁰ See *id.* at 236 (“But in a larger sense [the practice of law] includes legal advice and counsel, and the preparation of legal instruments and contracts by which legal rights are secured, *although such matter may or may not be depending in a court.*”) (emphasis added) (quoting *State ex rel. Stephan v. Williams*, 793 P.2d 234, 240 (Kan. 1990)).

²¹ *State ex rel. Stephan*, 793 P.2d at 235-36.

²² While there are no Mississippi cases on the issue, a few courts in other jurisdictions have addressed this issue. See *Doctor’s Assocs., Inc. v. Jamieson*, No. NNHCV064020952, 2006 WL 2348849, at *4 (Conn. Super. Ct. July 19, 2006) (finding that “the absence of a specific statute or rule concerning the practice of law in private arbitration proceedings is not a bar to the authority of the court to allow an out-of-state attorney who otherwise complies with [certain] requirements . . . to represent a client in such a proceeding”). *But see In re Glatthaar*, No. CV054015630, 2005 WL 3047275, at *1 (Conn. Super. Ct. Oct. 24, 2005) (finding that Connecticut’s pro hac vice admission procedures did not apply to arbitrations, thus the court could not allow the New York attorney to represent his clients in the Connecticut arbitration). See also Committee on Arbitration, *Unauthorized Practice of Law and the Representation of Parties in Arbitrations in New York by Lawyers Not Licensed to Practice in New York*, 63 THE RECORD OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK 700, at 730 (June 2008) (noting that a state court in Maine held that no rule or statute permitted the court to grant permission to out-of-state attorneys to practice before arbitrators) (citing *State v. Shimko*, No. CV-06-053, at *3 (Me. Super. Ct. Apr. 26, 2006)). See generally D. Ryan Nayar, *Unauthorized Practice of Law in Private Arbitral Proceedings: A Jurisdictional Survey*, 6 J. AM. ARB. 1, 18 (2007) (“[I]t is well understood that one way to avoid engaging in UPL is through obtaining pro hac vice admission. Although courts in some jurisdictions have expressly recognized that there is no equivalent to the pro hac vice application process in the context of private arbitration proceedings, courts in other jurisdictions have been willing to extend their authority to grant pro hac vice status in judicial proceedings to the context of private arbitrations.”) (footnotes omitted).

²³ See Miss. R. App. P. 46(b).

²⁴ See Nayar *supra* note 22, at 18 n.79.

III. THE SPLIT OF AUTHORITY NATIONALLY

Like Mississippi, many jurisdictions have yet to definitively address the issue of whether the representation of a party by an out-of-state attorney is the unauthorized practice of law.²⁵ In the states that have clearly spoken to the issue, there is a split of judicial authority. One group of states has caselaw stating that the representation of a client by an out-of-state attorney does not constitute the unauthorized practice of law,²⁶ while another group of states hold that such activity is the unauthorized practice of law.²⁷ In the vast majority of states, no state or federal court has addressed the issue.²⁸

New York and Illinois are two jurisdictions with court opinions stating that the representation of a client in an arbitration proceeding is not the unauthorized practice of law.²⁹ The first New York decision addressing this issue was *Williamson v. John D. Quinn Construction Corporation*, where the court made it clear that it did not consider the representation of a party in an arbitral proceeding by a lawyer from another jurisdiction the unauthorized practice of law.³⁰ The district court in *Williamson* reasoned that:

An arbitration tribunal is not a court of record; its rules of evidence and procedures differ from those of courts of record; its fact finding process is not equivalent to judicial fact finding; it has no provision for the admission *pro hac vice* of local or out-of-state attorneys.³¹

In another opinion out of the Southern District of New York, the district court reaffirmed the holding and reasoning enunciated in *Williamson*, even though it noted that arbitrations had become more complex since the *Williamson* decision.³² The *Prudential Equity Group* court found that despite the increased complexity of modern arbitration

²⁵ See Committee on Arbitration *supra* note 22, at 714-15, 732.

²⁶ See *infra* notes 29-37 and accompanying text.

²⁷ See *infra* notes 38-54 and accompanying text.

²⁸ See Nayar *supra* note 22, at 5.

²⁹ In a 1940 opinion from the United States Court of Appeals of the District of Columbia, the court stated that “[w]e are referred to no case, and we have not found one, in which it is held that the collection or arbitration of claims alone amounts to the practice of law,” and the court apparently did not consider representing a member of the District of Columbia Motor Club in arbitration to be the practice of law. *Am. Auto. Ass’n, Inc. v. Merrick*, 117 F.2d 23, 25 (D.C. Cir. 1940). Even though this case has not been overruled in the District of Columbia, its age gives it less authority. See Committee on Arbitration *supra* note 22, at 721-22. Also, the Supreme Judicial Court of Massachusetts has taken the position that even if the representation of a client in an arbitration proceeding constituted the practice of law, such a representation would not provide a basis for vacating an arbitration award. See *Superadio Ltd. P’ship v. Winstar Radio Prods., LLC*, 844 N.E.2d 246 (Mass. 2006); *Mscisz v. Kashner Davidson Sec. Corp.*, 844 N.E.2d 614 (Mass. 2006).

³⁰ 537 F. Supp. 613, 616 (S.D.N.Y. 1982).

³¹ *Id.* (footnote omitted).

³² See *Prudential Equity Group, LLC v. Ajamie*, 538 F. Supp. 2d 605, 607-08 (S.D.N.Y. 2008) (“*Williamson* . . . held that a non-New York lawyer participating in an arbitration in New York did not commit unauthorized practice under New York law. . . [because] there are material differences between an arbitration and a judicial proceeding, with the former being far more informal and applying much less stringent rules of evidence and procedure.”) (internal citations omitted).

proceedings, “they still retain in most settings their essential character of private contractual arrangements for the relatively informal resolution of disputes.”³³

Illinois is the only other state with a recent court opinion holding that the representation of a client in arbitration is not the unauthorized practice of law.³⁴ In *Colmar, Ltd. v. Fremantlemedia North America, Inc.*, the plaintiff sought to vacate an arbitration award on the grounds that the other party was represented by an attorney not licensed to practice in Illinois.³⁵ The court found that the representation by an out-of-state attorney in the arbitration had no effect on the arbitration award because the disputed action in the case was the participation in “*arbitration*, and not *court proceedings*,” thus Illinois’ general avoidance rule should not apply in this matter.³⁶ After reviewing the two possible views on the issue of whether the representation of a party in an arbitration proceeding constituted the unauthorized practice of law, the *Colmar* court stated that “we are inclined to employ the reasoning articulated by the Restatement, the ABA Commission and the court in *Williamson* to the facts in this case, and find that [the out-of-state lawyer’s] participation in the arbitration was not unauthorized.”³⁷

³³ *Id.* at 608; *see also* Siegel v. Bridas Sociedad Anonima Petrolera Industrial y Comercial, No. 90 Civ. 6108, 1991 WL 167979, at *5 (S.D.N.Y. Aug. 19, 1991) (“[R]epresentation of a party in an arbitration proceeding by a non-lawyer or a lawyer from another jurisdiction is not the unauthorized practice of law. . . . [Thus], [a]n attorney who is not admitted to practice in New York is . . . entitled to recover legal fees for services rendered in representing a client in an arbitration.”) (citations omitted); Johnson v. Nextel Commc’ns, Inc., No. 07 CV 8473, 2009 WL 928131, at *8 (S.D.N.Y. Mar. 31, 2009) (stating that both New York and New Jersey have committee reports expressing the view that the representation by a lawyer from another jurisdiction is not the unauthorized practice of law). Contrary to the statements by the *Johnson* court, New Jersey has adopted a rule similar to ABA Model Rule 5.5(c)(3), and the Committee on Unauthorized Practice of Law has opined that the answer to the question of whether such a representation constitutes the unauthorized practice of law depends on the out-of-state attorney complying with the limitations contained in the new rule. *See* Comm. on the Unauth. Prac. of Law Op. 43, 16 N.J.L. 191 (Jan. 29, 2007), http://lawlibrary.rutgers.edu/ethics/cuap/cua43_1.html (last visited Oct. 21, 2009); *see also* Committee on Arbitration *supra* note 22, at 734-35.

³⁴ In a Seventh Circuit case where the losing party in the arbitration proceeding held in Chicago, Illinois claimed that the arbitral award should be overturned because the other side was represented by a lawyer not admitted to practice in Illinois, Judge Posner ruled that such a representation was not a basis to overturn an arbitration award and that “the procedures and evidentiary rules in arbitration are matters for the arbitrators and the arbitration contract to determine . . . rather than for a court to impose.” *Sirotzky v. N.Y. Stock Exch.*, 347 F.3d 985, 990 (7th Cir. 2003) (citations omitted) *overruled in part on other grounds by* *Martin v. Franklin Capital Corp.*, 546 U.S. 132 (2005). Judge Posner pointed out that the rules of the NYSE governing arbitration “do not even require parties to be represented by a lawyer . . . let alone a licensed one.” *Id.* While not addressing the issue of this article directly, the *Sirotzky* opinion gives broad authority to arbitrators and contracting parties to determine who can represent the arbitrating parties in private arbitration proceedings.

³⁵ 801 N.E.2d 1017, 1120-21 (Ill. App. Ct. 2003). The plaintiff argued that because “judgments that result from legal proceedings brought in a court of record on a party’s behalf by a person who is not licensed to practice law in this state are void” under Illinois law, the court was obligated to vacate the arbitration award. *Id.* at 1122.

³⁶ *Id.*

³⁷ *Id.* at 1026. The court also noted that the new ABA Model Rule 5.5 (discussed *infra* notes 62-67 and accompanying text) “reflects the modern trend in the law of multijurisdictional practice and is also in keeping with well-reasoned decisions from other jurisdictions that have found that an out-of-state attorney’s representation of a client during arbitration does not violate the rules prohibiting the

Although the New York and Illinois decisions are well-reasoned, they stand for the minority position of the courts in the United States.³⁸ While the majority view on this subject is yet to be determined because of the large number of jurisdictions with no decisions, the plurality view is that participation in arbitration is the unauthorized practice of law. This view is led by the California Supreme Court decision in *Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court*.³⁹ In *Birbrower*, a California corporation brought a legal malpractice suit against the New York law firm that had represented it in a dispute which eventually settled prior to the start of the planned arbitration proceedings.⁴⁰ The New York law firm brought a counterclaim for unpaid legal fees, and the question for the California Supreme Court was whether the firm could recover its legal fees for services it performed in California (i.e., whether such services constituted the unauthorized practice of law).⁴¹

The *Birbrower* court found that the New York attorneys' activities in California, including the initiation of arbitration proceedings, constituted the unauthorized practice of law.⁴² The out-of-state attorneys argued that due to the differences between private arbitrations and legal proceedings there should be an exception to the rule regarding the unauthorized practice of law, citing to the *Williamson* opinion out of New York.⁴³ Despite these arguments, the court declined to create an arbitration exception to the statute regarding the unauthorized practice of law and distinguished *Williamson* by finding that in this matter "none of the time that the New York attorneys spent in California was spent in arbitration; *Williamson* thus carries limited weight."⁴⁴

unauthorized practice of law." *Id.* (citing *Williamson v. John D. Quinn Constr. Corp.*, 537 F. Supp. 613, 616 (S.D.N.Y. 1982)).

³⁸ See Wayne Klein, *The Unauthorized Practice of Law: Don't Leave Home at All?*, in SECURITIES ARBITRATION 2007: WINNING ARBITRATORS' HEARTS AND MINDS 437, 439-40 (2007).

³⁹ 949 P.2d 1 (Cal. 1998); see also Committee on Arbitration *supra* note 22, at 704.

⁴⁰ *Birbrower*, 949 P.2d at 3-4.

⁴¹ *Id.* at 3, 5. The court did note that the phrase "in California" did "not necessarily depend on or require the unlicensed lawyer's physical presence in the state." *Id.* at 5. The services that the out-of-state attorneys performed for their client in California were, *inter alia*, interviewing potential arbitrators, filing a demand for arbitration with the San Francisco office of the American Arbitration Association, and traveling to California to discuss with the client about settling the matter. *Id.* at 3.

⁴² See *id.* at 7. The California Supreme Court also stated that "[c]ompetence in one jurisdiction does not necessarily guarantee competence in another." *Id.* at 8. Since the *Birbrower* decision, the California Legislature adopted a section of its code of civil procedure to allow out-of-state attorneys to obtain authorization to represent a client in an arbitral proceeding. See CAL. CIV. PROC. CODE § 1282.4(b)-(c) (West 2007) (providing list of requirements for out-of-state counsel to satisfy).

⁴³ See *Birbrower*, 949 P.2d at 8.

⁴⁴ *Id.* at 8-9. California courts were not hesitant in distinguishing *Birbrower* if the parties actually did participate in an arbitration proceeding. See *Gerowitz v. Noll*, No. G030308, 2003 WL 1711279, at *2 (Cal. Ct. App. Mar. 28, 2003) ("[*Birbrower*] did not involve an arbitration. . . . Accordingly, *Birbrower* is factually distinguishable and does not apply here."); *Bank of Am., N.A. v. Jaidar*, No. B161297, 2003 WL 21513451, at *9 (Cal. Ct. App. July 3, 2003) ("The *Birbrower* court reasoned that *Williamson* carried limited weight because the out-of-state attorneys in *Birbrower* had spent no time in arbitration, thereby intonating that had they participated in arbitration proceedings, the result might have been different. . . . Here, it is undisputed that all Jaidar did was participate in arbitration. This factual difference renders Jaidar's reliance upon *Birbrower* flawed."). While not specifically addressing the issue of whether an out-of-state attorney's representation of a client in an arbitration proceeding is the unauthorized practice of law, the Hawaii Supreme Court's heavy reliance on the *Birbrower* opinion in *Fought & Co. v. Steel Engineering*

In the case of *In re Creasy*, the Arizona Supreme Court held that a disbarred attorney's representation of a client in private arbitration constituted the unauthorized practice of law.⁴⁵ Although not exactly on point, the court did provide that "the practice of law" had been defined in that state as follows:

[T]hose acts, whether performed in court or in the law office, which lawyers customarily have carried on from day to day through the centuries constitute the practice of law. Such acts . . . include rendering to another *any other advice or services* which are and have been customarily given and performed from day to day in the ordinary practice of members of the legal profession.⁴⁶

The court also noted that, under Arizona law, a person must be an "active member of the state bar" in order to practice law in Arizona.⁴⁷ Creasy argued that because his actions took place in the context of a private arbitration proceeding he did not engage in the unauthorized practice of law.⁴⁸ However, the court disagreed and found that the services he provided were the type that is ordinarily given by members of the legal profession and that Creasy "employed legal skill"; thus, he was engaged in the practice of law.⁴⁹

Other jurisdictions that have case law supporting the argument that representing a party in private arbitration is the unauthorized practice of law are Florida,⁵⁰ Connecticut,⁵¹ Ohio,⁵² and Maine.⁵³ Fortunately for non-Florida attorneys wishing to

& *Erection, Inc.* should give pause to an out-of-state attorney desiring to undertake such a representation in that state. 951 P.2d 487 (Haw. 1998).

⁴⁵ 12 P.3d 214 (Ariz. 2000).

⁴⁶ *Id.* at 216-17 (citation omitted).

⁴⁷ *Id.* at 216.

⁴⁸ *Id.* at 217. The petition requesting that Creasy be held in contempt for violating his disbarment was based upon his examination of a treating physician of his client during a private arbitral proceeding. *Id.* at 215.

⁴⁹ *Id.* at 217-18. At least one commentator believes that the *In re Creasy* decision stands for the proposition that an out-of-state attorney may not represent a party in private arbitration without engaging in the unauthorized practice of law. See Nayar *supra* note 22, at 7. Years following the *In re Creasy* decision, Arizona adopted a rule similar to ABA Model Rule 5.5. See State Bar of Arizona, *Arizona Ethics Rules*, <http://www.myazbar.org/Ethics/ruleview.cfm?id=51> (last visited Oct. 21, 2009).

⁵⁰ See Fla. Bar v. Rapoport, 845 So. 2d 874 (Fla. 2003) (finding that out-of-state attorney who represented parties in securities arbitration proceedings engaged in the unauthorized practice of law); see also Fla. Bar re Advisory Opinion on Nonlawyer Representation in Securities Arbitration, 696 So. 2d 1178 (Fla. 1997) (holding that it was unauthorized practice of law for nonlawyers in securities arbitration to give legal advice or perform traditional tasks of an attorney).

⁵¹ See *Doctor's Assocs., Inc. v. Jamieson*, No. NNHCV064020952, 2006 WL 2348849, at *1-2 (Conn. Super. Ct. July 19, 2006) ("It is simply irrational to conclude that [the out-of-state attorneys] would be doing anything other than 'practicing law' were they to present the case for the defendants in the Connecticut arbitration.").

⁵² See *Disciplinary Counsel v. Alexicole, Inc.*, 822 N.E.2d 348, 350 (Ohio 2004) ("Unless [the non-lawyer] becomes an attorney at law licensed and in good standing to practice law in the *state of Ohio*, [he] will not provide legal advice to any person in Ohio, including but not limited to, advice regarding . . . a person's right as a claimant or defendant in a securities arbitration.") (emphasis added). The Ohio Supreme Court has since adopted a rule similar to ABA Model Rule 5.5, thus limiting the effect of its *Alexicole* decision. See AMERICAN BAR ASSOCIATION, STATE IMPLEMENTATION OF ABA MODEL RULE 5.5,

represent clients in arbitrations in that state, the Florida Supreme Court recently adopted amendments to allow such a representation.⁵⁴

Based upon the foregoing analysis of the judicial opinions across the country addressing this issue, it seems clear that, besides the jurisdictions that specifically have answered the question of whether the representation of a client in an arbitration proceeding is considered the unauthorized practice of law, practitioners desiring to engage in such a representation in many states take a risk when they step into this “no man’s land.” Therefore, the adoption of a uniform rule nationally that would “facilitate multijurisdictional law practice in identifiable situations that serve the interests of clients and the public and do not create an unreasonable regulatory risk” would be extremely beneficial to attorneys who routinely represent clients in interstate arbitrations.⁵⁵

IV. POSSIBLE SOLUTIONS TO GIVE CLARITY TO MISSISSIPPI UPL LAW

One way to help clarify Mississippi’s stance on whether the representation of a client by an out-of-state attorney in a private arbitration is the unauthorized practice of law is for the Mississippi Legislature to modify MISS. CODE ANN. § 73-3-55 and make an exception for the representation of clients in private arbitration proceedings. Furthermore, while Mississippi has a general arbitration act, it does not address the issue of who may represent parties during arbitrations.⁵⁶ The Legislature could perhaps adopt the Revised Uniform Arbitration Act or some version thereof. For the purposes of this discussion, Oregon’s version of Section 16 of the Revised Uniform Arbitration Act⁵⁷ provides a clear answer to the multijurisdictional practitioner’s question addressed at the beginning of this article.⁵⁸ Section 36.670 of Oregon’s Uniform Arbitration Act provides that:

A party to an arbitration proceeding may be represented by a lawyer admitted to practice in this state or any other state. A corporation, business trust, partnership, limited liability company, association, joint venture or other legal or commercial entity may be represented by a lawyer admitted to practice in this state or any other state, by an officer of

http://www.abanet.org/cpr/mjp/quick-guide_5.5.pdf (last visited Oct. 21, 2009); *see also* Committee on Arbitration, *supra* note 22, at 736-37.

⁵³ *See* Committee on Arbitration, *supra* note 22, at 730 (citing *State v. Shimko*, No. CV-06-053, *3 (Me. Super. Ct. Apr. 26, 2006)).

⁵⁴ *See In re* Amendments to Rules Regulating the Fla. Bar & the Rules of Judicial Admin., 991 So. 2d 842 (Fla. 2008).

⁵⁵ *See* A.B.A. COMM. ON MULTIJURISDICTIONAL PRACTICE, REPORT 201B (2002), <http://www.abanet.org/cpr/mjp/201b.pdf> (last visited Oct. 21, 2009).

⁵⁶ *See* MISS. CODE ANN. §§ 11-15-1 to 11-15-143 (West 2008). However, section 11-15-115 does state that for arbitrations arising out of construction contracts and related agreements “[a] party has the right to be represented by an attorney at any proceeding.” *Id.* § 11-15-115.

⁵⁷ Section 16 of the Revised Uniform Arbitration Act merely states that “[a] party to an arbitration proceeding may be represented by a lawyer.” Rev. Unif. Arbitration Act § 16 (2000).

⁵⁸ *See* OR. REV. STAT. ANN. § 36.670 (West 2008).

the entity, or by an employee or other agent authorized by the entity to represent the entity in the proceeding.⁵⁹

This statute, as opposed to many other versions of the Revised Uniform Arbitration Act, is unambiguous as to the unauthorized practice of law issue and would be a good model to use if and when Mississippi ever elects to adopt a modern arbitration act.⁶⁰

Of course, as stated in *Darby*, the Mississippi Supreme Court has “inherent authority, independent of statute, to decide what acts constitute the practice of law.”⁶¹ Thus, in order to truly remove the doubt from the out-of-state attorney’s mind, or at least to put him or her at relative ease, the judiciary would need to adopt a rule allowing for representation by out-of-state counsel in arbitration proceedings.

A possible solution to this issue would be the Mississippi Supreme Court electing to adopt the American Bar Association’s (“ABA”) current version of Rule 5.5.⁶² In 2007, the Special Panel on Rules Governing Admission to the Mississippi Bar recommended adoption of a rule identical to ABA Model Rule 5.5.⁶³ One of the issues the special panel wanted to address was the issue of temporary practice in Mississippi where pro hac vice admission was impractical for lawyers involved in arbitration because there was no avenue for out-of-state attorneys to seek temporary admission. Under ABA Model Rule 5.5(c)(3):

A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that . . . are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer’s practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission.⁶⁴

As noted by a comment to ABA Model Rule 5.5, there is no single test to determine whether the out-of-state attorney’s services were provided on a “temporary basis” in a jurisdiction, but the comment does provide that said services may be “temporary” even when the attorney is representing a client in a single lengthy

⁵⁹ *Id.*

⁶⁰ For example, in New York the applicable provision only states that a party to an arbitration has the right to be “represented by an attorney.” N.Y. C.P.L.R. § 7506(d) (McKinney 2008); *see also* N.C. GEN. STAT. ANN. § 1-569.16 (West 2004) (“A party to an arbitration may be represented by an attorney or attorneys.”).

⁶¹ *Darby v. Miss. State Bd. of Bar Admissions*, 185 So. 2d 685, 688 (Miss. 1966).

⁶² *See Klein supra* note 38, at 448.

⁶³ *See* AMERICAN BAR ASSOCIATION, STATE IMPLEMENTATION OF ABA MODEL RULE 5.5, http://www.abanet.org/cpr/mjp/quick-guide_5.5.pdf (last visited Oct. 21, 2009). As of April 17, 2009, 40 jurisdictions, including the District of Columbia, have either adopted a rule identical to ABA Model Rule 5.5 or a rule similar to it. *See id.*

⁶⁴ MODEL RULES OF PROF’L CONDUCT R. 5.5(c)(3) (2002).

negotiation.⁶⁵ However, the out-of-state attorney “must obtain admission pro hac vice in the case of a court-annexed arbitration or mediation.”⁶⁶ The rationale for the current ABA Model Rule 5.5, as it relates to arbitration, is that in an arbitration proceeding without local rules, judges, or juries, a lawyer from the forum state is often not better qualified than an out-of-state attorney, and the denial of a client’s chosen counsel or representative could arguably impede prompt resolution of disputes.⁶⁷

Practitioners who routinely represent clients in private arbitrations would most likely assert that the limitations contained in ABA Model Rule 5.5(c)(3) are unnecessary and cloud the waters of a potentially crystal clear arbitration exception to state professionalism rules prohibiting the unauthorized practice of law. However, the adoption of ABA Model Rule 5.5 would be a reasonable middle ground between the two views that have been established in the United States – taking into consideration the policy grounds for both positions.⁶⁸ But the most beneficial aspect of ABA Model Rule 5.5 is that it provides more guidance to attorneys who engage in multistate arbitrations and more closely reflects the current needs of clients who choose to submit disputes to private arbitration in a given state than the former version of ABA Model Rule 5.5.⁶⁹ While the rule prohibiting the unauthorized practice of law protects the public against the rendering of legal services by unqualified persons, “it is the client who decides who can provide the very best advocacy possible. The client has the ultimate right to choose their selected counsel.”⁷⁰

⁶⁵ *Id.* at cmt. 6.

⁶⁶ *Id.* at cmt. 12. The Committee on Arbitration in New York has stated that “[t]o the extent that a ‘court-annexed arbitration’ is an arbitration actively administered by a relevant court system, not simply an arbitration that happens to concern [sic] a matter in court, this pro hac vice comment is appropriate. The comment would not properly extend beyond those circumstances, however (and we do not read it to do so).” Committee on Arbitration, *supra* note 22, at 749 n.251.

⁶⁷ See Samuel Estreicher & Steven C. Bennett, *Is Arbitration the Unauthorized Practice of Law?*, 231 N.Y. L.J. 3, 3 (Jan. 6, 2005) (citing A.B.A. COMM. ON MULTIJURISDICTIONAL PRACTICE, Report 201B (2002)). Estreicher and Bennett contend that the solution to the “patchwork of regulations” that exist all around the country relating to this issue could be solved by taking the position that the Federal Arbitration Act preempts state professional responsibility rules. *Id.* at 1, 4. However, this position has not been argued with great success. See *Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court*, 949 P.2d 1, 9 (Cal. 1998); *Fla. Bar v. Rapoport*, 845 So. 2d 874, 876-77 (Fla. 2003); Klein, *supra* note 38, at 439.

⁶⁸ See generally Committee on Arbitration, *supra* note 22, at 702-04, 714 (explaining that the new ABA Model Rule 5.5 may be viewed as a narrower approach than that previously established by prior law in states like New York; however, ABA Model Rule 5.5 is less strict than the view that an out-of-state attorney representing a client is the unauthorized practice of law); see also Klein, *supra* note 38, at 448 (ABA Model Rule 5.5 “grants significant flexibility to lawyers engaged in arbitration work around the country. However, it is not a panacea. Note carefully the limitations in the rule; legal services being provided in a jurisdiction must be provided ‘on a temporary basis’ and the services must be related to the lawyer’s practice in a jurisdiction in which the lawyer is admitted.”).

⁶⁹ Mississippi Rule of Professional Conduct 5.5 is the older version of the ABA Model Rule. Rule 5.5 merely states, *inter alia*, that a lawyer shall not “practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction.” Miss. R. Prof’l. Conduct. 5.5.

⁷⁰ *In re Williamson*, 838 So. 2d 226, 240 (Miss. 2002) (McRae, P.J., dissenting).

V. CONCLUSION

The current status of the law in Mississippi regarding whether representation in a private arbitral proceeding is the unauthorized practice of law is unclear due to the lack of caselaw and the fact that the Mississippi Rules of Professional Conduct have not been revised to address this situation. The Mississippi Legislature and the Mississippi Supreme Court may consider the possible solutions to this issue addressed in the foregoing in the near future given the growing popularity of private arbitration, the federal government's policy in enforcing agreements that require the parties to settle their disputes by arbitration, and the fact that the arbitration may have no connection to Mississippi; thus, lessening Mississippi's incentive to enforce its unauthorized practice of law rules to out-of-state attorneys representing clients in private arbitration proceedings.